

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. _____

FRIENDS OF ANIMALS,

Plaintiff,

v.

GEORGE "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture

and

ANIMAL AND PLANT HEALTH INSPECTION SERVICE, an agency of the United States,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff, Friends of Animals, brings this action to remedy violations of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* Specifically, Friends of Animals challenges the failure of the United States Animal and Plant Health Inspection Service (APHIS) to provide responsive documents within the time required under FOIA.

2. On June 4, 2019, Friends of Animals submitted a FOIA request to APHIS for documents and records held by APHIS related to Seaquest Aquarium, Inc. ("Seaquest") for the time period starting January 1, 2015 through the date of the FOIA request.

3. Friends of Animals requested "licenses of permits issued to SeaQuest," "documents relating to any decisions to grant or deny SeaQuest any license," "documents provided by SeaQuest in connection with any license or permit application or renewal," and

"communications with SeaQuest about any decisions to grant, renew, deny, suspend, or revoke any licenses or permits."

4. As of the date of this Complaint, APHIS has not provided any documents in response to this request.

5. APHIS is unlawfully withholding public disclosure of information that Friends of Animals is entitled to receive under FOIA. APHIS failed to comply with the statutory mandates and deadlines imposed by FOIA by failing to provide documents resolving Friends of Animals' request within the time required by law. Accordingly, Friends of Animals seeks declaratory relief establishing that APHIS violated FOIA. Friends of Animals also seeks injunctive relief directing APHIS to promptly provide the requested material free of cost.

JURISDICTION AND VENUE

6. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question).

7. This Court has the authority to grant declaratory relief under 28 U.S.C. §§ 2201 *et seq.* (Declaratory Judgment Act) and injunctive relief under 5 U.S.C. § 552 (a)(4)(B) (FOIA). An actual, justiciable controversy exists within the meaning of the Declaratory Judgment Act between Plaintiff and Defendants. This Court has jurisdiction, upon receipt of a complaint, "to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B).

8. Venue is proper in this Court pursuant to 5 U.S.C. § 552(a)(4)(B), which provides venue for FOIA cases in the district where the complainant resides or has a principle place of business. Plaintiff, Friends of Animals' Wildlife Law Program resides in Colorado and has a principal place of business in Centennial, Colorado. Venue is also proper under 28 U.S.C. § 1331(e) which provides a civil action may be brought against an officer or

agency of the United States where the plaintiff resides if no real property is involved in the action.

PARTIES

9. Plaintiff, FRIENDS OF ANIMALS, is a non-profit international advocacy organization incorporated in the State of New York since 1957. Friends of Animals has nearly 200,000 members and is the requester of the records that Defendant APHIS is now withholding. Friends of Animals has offices in Darien, Connecticut, and Centennial, Colorado. Friends of Animals' Wildlife Law Program, the office filing this Complaint, was established in 2013 and is located at 7500 E. Arapahoe Road, Suite 385, Centennial, Colorado.

10. Friends of Animals seeks to free animals from cruelty and exploitation around the world, and to promote a respectful view of non-human, free-living, and domestic animals. Friends of Animals engages in a variety of advocacy programs in support of these goals. Friends of Animals informs its members about animal advocacy issues and the organization's progress in addressing these issues, through its magazine, *Action Line*, its website, social media, and other reports. Friends of Animals has published articles and information advocating for the protection of animals from cruelty, including cruelty related to animals' conditions of captivity. Friends of Animals regularly submits requests under FOIA to further its goals and mission. APHIS's refusal to comply with FOIA injures Friends of Animals, its members, and its staff by preventing them from using the requested information to advocate for its mission.

11. Defendant GEORGE "SONNY" PERDUE III, in his official capacity as United States Secretary of Agriculture, has ultimate responsibility for APHIS and ensuring that the agency complies with federal law.

12. Defendant UNITED STATES ANIMAL AND PLANT HEALTH INSPECTION SERVICE is an agency of the United States housed within the Department of Agriculture and

has possession of the documents that Plaintiff, Friends of Animals, seeks. APHIS is an agency within the meaning of 5 U.S.C. § 552(f). APHIS has possession and control of the requested records and is responsible for fulfilling Friends of Animals' FOIA request.

LEGAL FRAMEWORK: FREEDOM OF INFORMATION ACT

13. Congress enacted FOIA to ensure public access to federal government records. FOIA carries a presumption of disclosure. *Dep't of State v. Ray*, 502 U.S. 164 (1991). Upon written request, FOIA requires agencies of the United States government to promptly disclose their records, unless the government can lawfully withhold the records from disclosure under one of nine specific exemptions in FOIA. 5 U.S.C. § 552(a)(3)(A). The burden is on the government—not the public—to justify why particular information may be withheld. *Ray*, 503 U.S. at 164.

14. FOIA requires agencies to “determine within 20 days . . . after the receipt of any such request whether to comply with such request and shall immediately notify the person making such request of . . . such determination and the reasons therefor” and, in the case of an adverse determination, the right of such person to appeal to the head of the agency. 5 U.S.C. § 552(a)(6)(A)(i).

15. On determination by an agency to comply with the request, the records shall be made “promptly available.” *Id.* § 552(a)(6)(C).

16. In “unusual circumstances” an agency may extend the time limits up to ten working days by providing written notice to the requester setting forth the unusual circumstance and the date on which the determination is expected to be dispatched. *Id.* § 552(a)(6)(B). With respect to a request for which the agency purports to apply the “unusual circumstances,” the agency must (1) notify the requester if the request cannot be processed within the time limit specified in that clause and (2) provide the requester an opportunity to limit the scope of the request so that it may be processed within that time

limit or an opportunity to arrange with the agency an alternative time frame for processing the request or a modified request. *Id.*

17. If the agency fails to complete its response to a request within twenty workdays, the requester is deemed to have constructively exhausted administrative remedies and may seek judicial review. 5 U.S.C. § 552(a)(6)(C)(i).

18. Additionally, if the agency fails to comply with the statutory time limit, it cannot assess search fees. 5 U.S.C. § 552(a)(4)(A)(viii).

19. Department of Agriculture regulations provide for multitrack processing when the “agency has a significant number of requests, the nature of which precludes a determination within 20 working days.” 7 C.F.R. § 1.8(a). When used, this allows the agency to place requests in different tracks based on the date of receipt, the amount of work and time needed to respond, and whether it qualifies for expedited processing. *Id.*

20. The agency may give the requester an opportunity to limit the scope of its request in order to qualify for a faster track. 7 C.F.R. § 1.8(c).

21. The “multitrack processing system does not lessen agency responsibility to exercise due diligence in processing requests in the most expeditious manner possible.” *Id.*

22. The use of multi-track processing does not alter FOIA’s statutory deadline for an agency to determine whether to comply with the FOIA request. *Id.* An agency must make a determination whether to comply with the FOIA request, and notify the requester accordingly, within the mandatory deadlines described above.

23. United States district courts have jurisdiction “to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.” 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

24. Friends of Animals submitted its FOIA request to APHIS’s National FOIA Office on June 4, 2019. The FOIA request was submitted via email and via U.S. mail.

25. Friends of Animals requested copies of documents held by APHIS from January 1, 2015 to the present relating to SeaQuest.

26. Specifically, Friends of Animals requested “licenses or permits issued to SeaQuest,” “documents relating to any decisions to grant or deny SeaQuest any license,” “documents provided by SeaQuest in connection with any license or permit application or renewal,” and “communications with SeaQuest about any decisions to grant, renew, deny, suspend, or revoke any licenses or permits.”

27. On June 5, 2019, APHIS emailed Friends of Animals and acknowledged its receipt of Friends of Animals’ FOIA request. APHIS assigned it tracking number 2019-APHIS-04422-F. APHIS provided a “target response date” of July 3, 2019.

28. After receiving no response or correspondence from APHIS by July 3, 2019, or the week following that, Friends of Animals emailed APHIS’s National FOIA Office on July 12, 2019, asking for a date when Friends of Animals could expect to receive a response to its request.

29. On July 15, 2019, APHIS emailed Friends of Animals and notified it that its “FOIA request is still being searched in our Animal Care program. We are not aware of when – the completion of the search for the responsive records will be ready. We have contacted the Animal Care program for the status of your FOIA search. Once we hear from the [sic] them, we can contact you.”

30. No one from APHIS ever contacted Friends of Animals about the status of its FOIA request or when it could expect to receive a response.

31. APHIS never asked Friends of Animals to narrow its FOIA request in order to expedite the agency’s response.

32. As of the date of the Complaint, Friends of Animals has not received any additional email responses or correspondence from APHIS’s FOIA Office or anyone else at APHIS.

33. As of the date of this Complaint, APHIS has not provided any documents in response to the FOIA request that Friends of Animals submitted more than three months ago.

34. APHIS has offered no reasonable explanation for its delay, and it has failed to provide a specific date for when it will comply with its obligations under FOIA.

35. APHIS is unlawfully withholding public disclosure of information sought by Friends of Animals, information to which Friends of Animals is entitled to receive, and for which APHIS has not provided a valid disclosure exemption.

CLAIM FOR RELIEF
(Violation of the Freedom of Information Act)

36. Friends of Animals herein incorporates all information and allegations contained in the preceding paragraphs.

37. Friends of Animals properly requested records within the control of APHIS on June 4, 2019.

38. APHIS failed to release the records that Friends of Animals requested and failed to make any claims of statutory exemption regarding the requested records.

39. As of the date of this Complaint, APHIS has not made a determination on Friends of Animals' FOIA request and has not provided any documents or records in response to the FOIA request.

40. As of the date of the Complaint, APHIS has not made any claims of statutory exemption with regard to the records and documents requested in Friends of Animals' FOIA request.

41. Accordingly, Friends of Animals is entitled to injunctive and declaratory relief with respect to the release and disclosure of the records requested.

REQUEST FOR RELIEF

Friends of Animals respectfully requests that the Court enter judgment providing the following relief:

- A. Declare that APHIS violated FOIA by failing to lawfully satisfy Friends of Animals' request under FOIA;
- B. Order APHIS to process and immediately release all records responsive to Friends of Animals' request at no cost to Friends of Animals;
- C. Retain jurisdiction of this action to ensure the processing of Friends of Animals' request, and to ensure that no agency records are wrongfully withheld;
- D. Award Friends of Animals costs, including reasonable attorney fees and litigation costs in this action, pursuant to FOIA, 5 U.S.C. § 552(a)(4)(E); and
- E. Grant Plaintiff any other relief that the Court deems just and proper.

Dated: September 10, 2019

Respectfully submitted,

/s/ Jennifer E. Best

Jennifer E. Best (CO Bar # 46549)
Friends of Animals, Wildlife Law Program
7500 E. Arapahoe Rd., Suite 385
Centennial, CO 80112
720-949-7791
jennifer@friendsofanimals.org

Attorney for Plaintiff